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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 338.

WILLIAM HERYFORD AND JAMES W. LEWIS, PLAINTIFFS IN ERROR,

vs.

HENRY H. DAVIS, SHERIFF OF CHARITON COUNTY, SUING TO THE USE OF THE JACKSON & SHARP COMPANY.

N ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 29, 1877.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term, 1877, thereof, between Henry H. Davis, sheriff of Chariton County, Missouri, suing to the use of the Jackson and Sharp Company, plaintiff, and William Heryford and James W. Lewis, defendants, a manifest error hath happened, to the great damage of the said William Heryford and James W. Lewis, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.]

H. C. GEISBERG,
Clerk Circuit Court United States,
Western District of Missouri.

Allowed by—

A. KREKEL, *Judge.*

2 *Return to writ.*

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at the city of Jefferson, this seventh day of August, A. D. 1877.

[SEAL.]

H. C. GEISBERG,
Clerk.

(Indorsed:) No. 582. United States circuit court, western district of Missouri. H. H. Davis, to use, &c., vs. Wm. Heryford et al. Writ of error to the circuit court of the United States, western district of Missouri. Returned and filed, day of , 187 . , clerk.

3 The United States of America to Henry H. Davis, sheriff of Chariton County, Missouri, suing to the use of the Jackson and Sharp Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein William Heryford and James W. Lewis are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arnold Krekel, judge of the circuit court of the United States for the western district of Missouri, this twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

A. KREKEL,
Judge.

4 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

We hereby acknowledge due service of the within citation this 22nd day of May, A. D. 1877.

LAY & BELCH,
Attorneys for Defendant in Error.

(Indorsed:) 582. United States circuit court, western district of Missouri. H. H. Davis, to use, &c., vs. Wm. Heryford et al. Citation. Filed May 22nd, 1877. H. C. Geisberg, clerk.

5 UNITED STATES OF AMERICA,
Western District of Missouri, set:

Pleas and proceedings had before the honorable circuit court of the United States within and for the western district of Missouri, at the April term thereof, A. D. 1877, in the case of Henry H. Davis, to the use of the Jackson & Sharp Company, plaintiff, vs. William Heryford and James W. Lewis, defendants. No. 582.

Be it remembered that heretofore, to wit, on the 25th day of October, A. D. 1875, there was filed in the clerk's office of the circuit court of the United States in and for said district, a petition in the following words and figures, to wit:

Petition.

In the United States circuit court for the western district of Missouri.

HENRY H. DAVIS, SHERIFF OF CHARITON County, Missouri, to the use of the Jackson & Sharp Company, a corporation duly incorporated under & by the laws of the State of Delaware, & located at the city of Wilmington, in said State, plaintiff,
vs.
WILLIAM HERYFORD AND JAMES W. LEWIS, defendant.

6 1st. Plaintiff states that the Jackson and Sharp Company is a

corporation duly incorporated under and by the laws of the State of Delaware and a citizen of said State of Delaware.

2nd. That the defendants, William Heryford and James W. Lewis, are citizens of the State of Missouri and the western district thereof.

3rd. That on the 12th day of December, A. D. 1874, and long prior thereto, the *the* said Jackson and Sharp Company was the owner of one passenger car No. 1, and one mail, baggage, and express car No. 1, lettered with the name of the Keokuk and Kansas City Railway Company, which had before that time, to wit, on or about the 23rd day of December, A. D. 1873, been by said Jackson and Sharp Company loaned for hire to the said Keokuk and Kansas City Railway Company.

4th. That the defendant, William Heryford, prior to the said 12 day of December, 1874, caused the said Henry H. Davis, sheriff of Chariton County, Missouri, as aforesaid, to levy upon and seize, under and by virtue of an execution issued from the Chariton County circuit court on the 25th day of November, 1874, in favor of the said defendant, William Heryford, and against the said Keokuk and Kansas City Railway Company and the Western Construction Company, upon the said passenger coach No. 1, and the said mail, baggage, and express car No. 1, as the property of the said Keokuk and Kansas City Railway Company.

5th. That on the 12th day of December, 1874, the said Jackson and Sharp Company, in pursuance of the statute of Missouri in such case
7 provided, served notice on the said Henry H. Davis, as sheriff as aforesaid, claiming to be the true and lawful owner of said passenger, mail, baggage, and express cars.

6th. That on the 15th day of December, 1874, the said defendant, William Heryford, as principal, and the other defendant, James H. Lewis, as security, executed and delivered to the said Henry H. Davis, as sheriff as aforesaid, their certain writing obligatory and bond, in words and figures as following, to wit:

Know all men by these presents that we, William Heryford, as principal, and James W. Lewis, as surety, acknowledge ourselves, our heirs, &c., severally and jointly, to owe and be indebted to Henry H. Davis, as sheriff of Chariton County, in the State of Missouri, in the just and full sum of thirteen thousand dollars, for the payment of which we bind ourselves firmly by these presents. Given under our hands and seals this 15th day of December, 1874.

The above obligation is conditioned that whereas the above bounden William Heryford, principal, caused Henry H. Davis, sheriff of Chariton County aforesaid, to levy and seize, under and by virtue of an execution issued from the Chariton County circuit court on the 25th day of November, 1874, in favor of said bounden William Heryford, and against the Keokuk and Kansas City Railway Company and the Western Construct on Company, upon the passenger coach No. one, and one mail, baggage, and express car number one, branded with the name of the K. & K. C. R. W. Co., as the property of the said Keokuk and Kansas City Railway Company; and whereas Jackson and Sharp Company did, on the 12th day of December, 1874, serve a notice
8 on the said Henry H. Davis, as sheriff aforesaid, claiming to be the true and lawful owner of said property; said bond is to the effect that the said bounden William Heryford and his security will indemnify the said H. H. Davis, as sheriff aforesaid, against all damages and costs which he may sustain in consequence of the seizure and sale of the above-described passenger coach number one, and mail, baggage, and express car number one, branded with the name of the K. & K. C.

R. W. Co., and to satisfy and pay to any person or persons claiming the same, all damages which said person or persons may sustain in consequence of such seizure and sale, then this bond and these presents shall be void; otherwise to remain in full force.

A copy of which said bond is herewith filed, marked Exhibit A; the original being on file in the office of the circuit court of Chariton County, Missouri, cannot be filed herewith.

And for assignment of a breach of the condition of said bond, the plaintiff states:

7th. That after taking from the defendants the bond aforesaid, the said Henry H. Davis, sheriff as aforesaid, under the execution as aforesaid, proceeded to sell the property as aforesaid, the same property of the said Jackson and Sharp Company as aforesaid, by which the said property and the use and hire thereof were totally lost to the said Jackson and Sharp Company.

8th. That the said passenger car was of the value of four thousand dollars, and the said mail, baggage, and express car was of the value of three thousand dollars, and that the use and hire of said cars were of the value of one thousand dollars per annum.

9 9th. That by reason of the said seizure and sale of said cars as aforesaid the said Jackson and Sharp Company has sustained damages in the sum of nine thousand dollars.

9½. That the defendants have failed, neglected, and refused to pay the said Jackson and Sharp Company the damages so sustained by said company as aforesaid by reason of the seizure and sale of said property or any thereof, although often requested so to do.

10th. That under and by sections 28 and 29 of chapter 160 of the general statutes of Missouri, an action has accrued to the said Jackson and Sharp Company to have and recover from the defendants on the bond aforesaid to its use in the name of the said Henry H. Davis, sheriff as aforesaid, the said sum of nine thousand dollars, the damages sustained by the said Jackson and Sharp Company as aforesaid.

Wherefore said plaintiff prays judgment to the use of the said Jackson and Sharp Company for the sum of thirteen thousand dollars, the penalty in said bond mentioned, and that execution issue for the damages so sustained by said company, and for such other judgment as may be proper in the premises.

LAY & BELCH,
Att'ys for Plaintiff.

Whereupon there was issued out of said clerk's office a summons in the following words and figures, to wit:

Summons.

WESTERN DISTRICT OF MISSOURI, *set:*

10 The President of the United States of America to the marshal of the western district of Missouri, greeting:

You are hereby commanded to summon William Heryford and James W. Lewis, citizens of said district, that they be and appear before the honorable circuit court of the United States for the western district of Missouri, on the first day of the next term thereof, to be holden at the city of Jefferson, in and for said district, on the 15th day of November next, then and there to answer the complaint of Henry H. Davis, sheriff of Chariton County, Missouri, suing to the use of the Jackson and Sharp

Company, a corporation and a citizen of the State of Delaware, as set forth in the petition filed in said court on the 25th day of October, A. D. eighteen hundred and seventy-five. Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 25th day of October, A. D. eighteen hundred and seventy-five.

Issued at office in the city of Jefferson, under the seal of said court, the day and year last aforesaid.

[SEAL.] H. C. GEISBERG,
Clerk of said Court.

Upon said summons the marshal of the United States for said district made the following return, to wit:

Marshal's return.

I certify that I executed this writ by delivering to James W.
11 Lewis (person first served) a copy of the within summons, together with a copy of the petition filed in this cause, and by delivering a copy of this writ to a white member of the family above the age of fifteen years of the within named William Heryford, all on the 29th day of October, 1875, at the county of Chariton, in the western district of Missouri.

GEO. SMITH,
U. S. Marshal,
By S. O. TENNY,
Deputy.

And afterwards, on the 9th day of November, A. D. 1875, it being in vacation of said circuit court, the following further proceedings were had in this case, to wit:

Answer filed.

HENRY H. DAVIS, TO USE, &C.,
vs.
WILLIAM HERYFORD ET AL.

This day come the said defendants, by J. A. Clark and Thomas Shackelford, and file their answer to the petition herein.

Said answer so filed as aforesaid is in words and figures following, to wit:

Answer.

In the United States circuit court for the western district of Missouri.

HENRY H. DAVIS, SHERIFF OF CHARITON County, Missouri, to the use of Jackson and Sharp Company, a corporation duly in-
12 corporated under and by the laws of the State of Delaware, and located at the city of Wilmington, in said State, plaintiffs,

vs.

WILLIAM HERYFORD AND JAS. W. LEWIS, DEfendants.

Defendants, for answer to plaintiff's petition in this cause, states that

as to whether Jackson and Sharp Company is a corporation incorporated under and by the laws of the State of Delaware and a citizen of the State of Delaware or not, defendants have no knowledge or information sufficient to form a belief.

Defendants deny that on the 12th day of December, 1874, or any short time prior thereto, Jackson and Sharp Company was the owner of the passenger car and *and* the mail, baggage, and express car named in plaintiff's petition.

Defendants deny that said Jackson and Sharp Company loaned said cars for hire or otherwise to the Keokuk and Kansas City Railway Company on or about the twenty-third (23) day of December, 1873, or at any other time.

Defendants state and allege the fact to be that the said Keokuk and Kansas City Railway Company, on the said twelfth (12) day of December, 1874, was and long prior to that time had been the legal owner of said cars and was rightfully and legally in possession of the same, and that the said sheriff rightfully and legally levied said execution upon said passenger coach, mail, baggage, and express car, and seized the same under and by virtue of said executions as the property of
13 Keokuk and Kansas City Railway Company, and afterwards sold said property to satisfy said execution, as he had a right to do.

Defendants deny that said passenger coach was of the value of 4,000 dollars, or that the said mail, baggage, and express car were of the value of 3,000 dollars, or that the use and hire of said cars were of the value of 1,000 dollars per annum.

Defendants deny that the said Jackson and Sharp Company has sustained damages in the sum of 9,000 dollars or any other sum by reason of the seizure & sale of said cars by the said sheriff as aforesaid.

And having fully answered plaintiff's petition, defendants pray to be discharged with their reasonable costs.

JAS. A. CLARK & THOS. SHACKELFORD,
Atty's for Def't.

GEO. T. WHITE, *For Def't.*

And afterwards, at a regular stated term of said circuit court of the United States within and for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the third Monday, being the 16th day of November, A. D. 1875, the following further proceedings were had in this case on the 10th day of December in said last mentioned year, to wit:

Reply filed.

H. H. DAVIS, TO THE USE, &C.
vs.
WILLIAM HERYFORD ET AL.

14 This day comes the plaintiff, by A. M. Lay, esq, his attorney, and by leave of court files a reply to the answer herein, and upon motion of the said attorney it is ordered that this case be continued.

Said reply so filed as aforesaid is in words and figures, to wit:

Reply.

U. S. circuit court, western district of Missouri.

HENRY H. DAVIS, SHERIFF OF CHARITON County, Missouri, to use of Jackson and Sharp Company, plaintiff,
against
WILLIAM HERYFORD & JAMES W. LEWIS, defendants.

Plaintiff, for replication to defendants' answer, deny, that the Keokuk and Kansas City Railway Company, on the 12th day of December, 1874, or at any other time, was the legal owner of the said cars mentioned in said answer, or rightfully or legally in the possession of the same, as such alleged owner, and deny that said sheriff rightfully or legally levied said execution upon said cars or seized the same by virtue of said execution as the property of said railway company, and deny that he had any right to seize or sell the same as the property of said railway company.

LAY & BELCH,
Att'ys for Plaintiff.

15 And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday of April, A. D. 1876, at the place aforesaid, the following further proceedings were had in this case on the 24th day of April, 1876, to wit:

H. H. DAVIS, TO THE USE, &C.,
vs.
WILLIAM HEREFORD ET AL.

This day come the parties, by their attorneys, the plaintiff by A. M. Lay, esq., and the defendants by Thomas Shackelford, esq., and this case being regularly called for trial, a stipulation is filed waiving a jury herein, and thereupon this cause is tried by the court sitting as a jury and submitted on the pleadings and proofs.

And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday of April, A. D. 1876, at the place aforesaid, the following further proceedings were had in this case on the 26th day of April, 1876, to wit:

Jury waiver filed.

H. H. DAVIS, TO THE USE, &C.,
vs.
WILLIAM HERYFORD ET AL.

This day come the parties, by their attorneys, and file herein a stipulation signed by counsel, waiving a jury, &c., and also file an agreed statement of facts.

Said waiver of jury, so filed as aforesaid, is in words and figures following, to wit:

Jury waiver.

In the circuit court of the United States for the western district of Missouri.

H. H. DAVIS, SHERIFF OF CHARITON COUNTY, Missouri, to the use of the Jackson & Sharp Company, plaintiff,
against
WILLIAM HERYFORD & JAMES W. LEWIS, defendants.

In the above entitled cause the parties thereto stipulate as follows:

1st. We hereby waive a jury and submit this cause for trial to the court.

2nd. When the questions of law involved and the measure of damages, if any, are determined by the court on the finding of facts herein, the parties hereto may take depositions, if necessary, as to the amount of damages sustained.

16 3d. The parties hereto, as and in such time as the court shall direct, shall submit written or printed briefs upon the questions of law involved.

LAY & BELCH WITH
GILES, GIVEN & McKEE,
For Plff.

GEO. T. WHITE, WITH
CLARK AND SHACKELFORD,
For Def'ts.

And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of November, A. D. 1876, at the place aforesaid, the following further proceedings were had in this case on the 22d day of November, 1876, to wit:

Submission set aside.

H. H. DAVIS, TO THE USE OF, &C.,
vs.
WILLIAM HERYFORD ET AL.

This day comes the plaintiff, by A. M. Lay, esq., and it is thereupon ordered that the submission herein be set aside and this case be continued.

And afterwards, at said last mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 23d day of November, A. D. 1876, to wit:

Cont. set aside.

H. H. DAVIS, TRUSTEE, &C.,
vs.
WILLIAM HERYFORD ET AL.

This day come the parties, by their attorneys, the plaintiff by A. M.

Lay, esq., and the defendants by Geo. T. White, esq., and by consent it is ordered that the continuance herein be set aside.

17 And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of April, A. D. 1877, at the place aforesaid, the following further proceedings were had in this case on the 23d day of April, 1877, to wit:

Trial by court.

H. H. DAVIS, ETC.,
vs.
WILLIAM HERYFORD ET AL.

This day come the parties, by their attornies, the plaintiff by A. M. Lay, esq., and the defendants by Messrs. George T. White and L. H. Waters, and this cause being regularly called for trial, a jury is waived and the same is heard by the court sitting as a jury upon the pleadings and proofs.

And afterwards, at said last mentioned regular stated term of said circuit court, the following proceedings were had in this case on the 24th day of April, A. D. 1877, to wit:

Judgment.

H. H. DAVIS, TO USE, &C.,
vs.
WILLIAM HERYFORD ET AL.

This day again come the parties, by their attorneys, and this cause having been heretofore submitted to the court upon the pleadings and proofs, and being now fully advised concerning the premises, the court doth find that the defendants, William Heryford and James W. Lewis are indebted to the plaintiff, Henry H. Davis, to the use of the
18 Jackson and Sharp Company, by reason of the matters charged in the petition, in the sum of four thousand three hundred and forty dollars ($4,340).

It is therefore considered by the court that the said plaintiff recover against the said defendant the said sum of four thousand three hundred and forty dollars ($4,340), so found to be due, together with his costs herein expended, and have execution therefor.

And a special finding of facts, with conclusion of law and certificate of division of opinion thereon, are filed herein by the court and ordered to be made a part of the record.

And said special finding of facts, so filed as aforesaid, is in words and figures following, to wit:

Special finding.

In the circuit court of the United States, western district of Missouri.

HENRY H. DAVIS, TO THE USE OF THE JACKSON & SHARP COMPANY, plaintiff,
vs.
WILLIAM HERYFORD AND JAMES W. LEWIS, defendants.

1st. That on and prior to the 23d day of December, 1873, the date of

the contract hereinafter mentioned and set out, the plaintiff, The Jackson and Sharp Company, was a corporation incorporated under and by the laws of the State of Delaware, having its office and doing business at the city of Wilmington, in the State of Delaware, and engaged in manufacturing railroad cars; that the Keokuk and Kansas City Railroad Company, a corporation incorporated under and by the laws of the State of Missouri, and engaged in the construction of a railroad through the county of Chariton and other counties in the State of Missouri.

2nd. That on the 5th day of January, 1874, the plaintiff delivered to said railroad company at Salisbury, Missouri, to be used on its railroad in the State of Missouri, one passenger car No. 1, and one mail, baggage, and express car, also No. 1, lettered with the name of the aforesaid railroad company, under and pursuant to the terms and conditions of a written contract dated the twenty-third day of December, 1873, as follows, to wit:

3rd. Articles of agreement, made and entered into this twenty-third day of December, A. D. 1873, by and between the Jackson and Sharp Company, a corporation of the State of Delaware, located in the city of Wilmington, State aforesaid, of the first part, and the Keokuk and Kansas City Railway Company of Missouri, with office at Salisbury, State aforesaid, of the second part, witnesseth:

That the parties of the first part have constructed one passenger car No. 1, and one mail, baggage, and express car, also No. 1, and lettered with the name of the aforesaid railway co., to be used on the railroad of the party of the second part for hire. It is therefore agreed as follows: The said party of the first hereby agree to loan to the said party of the second part, for hire, the said passenger and mail, baggage, & express cars for the space of four months from the date of this agreement, to be used on the said Keokuk and Kansas City Railway Co., and to deliver the same to the party of the second part at Wilmington, Delaware, to be transported to the said railway company at Salisbury, Missouri, at the expense and risk of the party of the second part, to be used on the said road for hire as aforesaid, and not elsewhere without the written consent of the party of the first part.

The party of the first part have received from the party of the second part three promissory notes of the party of the second part, to the order of Western Construction Co., and endorsed by A. C. Vandewater, president, F. A. Jones, John Foggett, A. C. Vandewater, G. P. Lawrence, Jno. C. Noyes, and J. W. Morse, together with thirteen of the first mortgage bonds of said railway co. of one thousand dollars each, as collaterals for said notes; two of said notes are dated November 14, 1873, one sixty days and the other four months each, for the sum of nineteen hundred and nineteen $\frac{20}{100}$ each, with interest at the rate of ten per cent. per annum, after date, and payable at the Mercantile Bank of St. Louis, Missouri; the other of said notes is of date of December 15, 1873, four months, and for the sum of twenty-five hundred and eighty-three dollars, and without interest, and is made payable at the National Bank of Commerce N. Y.; which said three notes the said party of the first part are to hold as collateral security and to collect the same at maturity, and to hold the proceeds when collected for the safe custody and return to the party of the first part, when demanded, of the said passenger and mail, baggage, & express cars delivered to the party of the second part for the term of four months, for hire, as aforesaid, the

said party of the second part to have the right and privilege to purchase at any time the said passenger & mail, baggage, & express cars
21 within the period of four months from aforesaid date, upon the payment to the party of the first part in cash the sum of six thousand three hundred and thirty-eight $\frac{40}{100}$ dollars, with interest at the rate of ten per cent. per annum from the date of the agreement until day of payment, but until such payment is made in full the said party of the second part shall have no right, title, claim, or interest in and to the said passenger and mail, baggage, and express cars, except as to their use or hire, nor any right or authority in any way to dispose of, hire, sell, mortgage, or pledge the same, but that the said cars are and shall remain the property of the party of the first part, to be accounted for by the party of the second part to the party of the first part, and to be redelivered to the party of the first part, when demanded in default of the payment of the aforesaid sum of six thousand three hundred and thirty-eight $\frac{40}{100}$ dollars, with interest as aforesaid, hereinbefore described, anything to the contrary herein contained notwithstanding.

It is also agreed that should there be any default in the payment of any one of the above described three promissory notes at the time and on the day that they or either of them respectively become due and payable, and the party of the first part shall elect to take into their own possession the above described passenger and mail, baggage and express cars delivered as aforesaid, the several sums which may have been collected on account of the above described promissory notes are to be retained by the party of the first part for their own use, and the passenger and the mail, baggage, and express cars are to be sold by the party of the first part at public or private sale, and of the nett amount realized from said sale so much as should be needed to
22 make the amount remaining due and unpaid on the above described promissory notes, with the interest that may have accrued on the same, shall be retained by the said party of the first part, and the surplus, if any, shall be paid over to the said party of the second part.

And the said party of the first part thereby agree with the said party of the second part that if all the said three promissory notes are paid on the day and at the time that they the said three promissory notes severally became due and payable according to their terms, tenor, and effect, that upon payment of all the said notes having been made without any hinderance or delay whatever, the party of the first part will then relinquish their ownership to the said passenger-car & the mail, baggage, & express car and will give to the party of the second part a good and sufficient bill of sale or conveyance for the said cars, and will apply to the payment of the same the proceeds of the above described promissory notes, interest on notes overdue in any event to belong to the party of the first part.

And it is also agreed and understood that if the said notes are paid according to their tenor and effect that the said party of the first part may retain the money paid upon said notes, and then the said cars shall belong to and be the property of the said party of the second part, and the said party of the first part shall on request relinquish their ownership thereof, and make a bill of sale or conveyance of all their right, title, and interest therein to the said party of the second part.

23 In witness whereof the parties have hereto set their name and caused the seal of their respective corporations to be affixed.

[SEAL.] JACKSON AND SHARP COMPANY,
JOB H. JACKSON,
THE KEOKUK & KANSAS CITY RAILWAY CO.,
By S. H. MELVIN,
President.

[SEAL.] ALBERT BLAIR,
Secretary.

4th. That said cars were brought to Missouri and were placed upon and used by said railroad company on its railroad in Chariton County, Missouri.

5th. That the notes mentioned in said contract were not paid at maturity, and still remain unpaid; that on the 4th day of December, 1873, the said plaintiff received thirteen thousand dollars in the first mortgage bonds of said railroad company as collateral security for the notes mentioned in said contract, for which the said plaintiff executed and delivered its receipt, which is in the following words and figures, to wit:

WILMINGTON, DEL., *December* 4, 1873.

Received of Keokuk and Kansas City R. R. Co. thirteen one thousand dollar bonds, No. 281 to 293, both numbers inclusive, as collateral for said Co. notes given in payment for one passenger car, and for notes yet to be given for one mail, bagg., & ex. car.

JOB H. JACKSON, *Pres't.*

6th. That said bonds are yet in the hands of said plaintiff.

24 7th. That the defendant in this cause filed their several liens for materials furnished and labor performed in the construction of said railroad against said railroad co. and the Western Construction Co., and recovered judgments in the circuit court of Chariton County, Missouri, against said companies on the 20 day of November, 1874, under and by virtue of the provisions of an act of the general assembly of the State of Missouri, entitled "An act to protect contractors, subcontractors, and laborers in their claims against railroad companies or corporations, contractors or sub-contractors," approved March 21st, 1873, said judgments being in the following forms, to wit:

"Now, at this day, this cause coming on to be heard, and an interlocutory judgment having been rendered at the last term of this court in default of said defendants, both having been duly served with process, and no jury being demanded, the court proceeds to try the cause and to assess the damage sustained by the plaintiffs in this cause; whereupon the court finds from the evidence and admissions in the pleadings that the plaintiff hath sustained damages in the sum of dollars, being the amount claimed in plaintiff's petition, with interest at the rate of six per cent. per annum, from the 24th day of April, 1874 (the date of the service of the summons in this cause).

"It is therefore considered and adjudged by the court that the plaintiff recover of the said defendants the sum of four thousand eight hundred and twenty-nine and $\frac{78}{100}$ dollars, for his debt and damages, together with his costs by him about his suit in this behalf laid out and expended; and it appearing to the satisfaction of the court that

25 the damages sustained by the plaintiff in this cause is for materials and cross-ties furnished defendants on the Keokuk and Kan-

sas City Railroad in constructing and improving the road-bed of said railroad, and the said plaintiff having fully and in all things complied with the requisition of an act of the general assembly of the State of Missouri, entitled 'An act to protect contractors, sub-contractors, and laborers in their claims against railroad companies or corporations, contractors or sub-contractors,' approved March 7th, 1873, it is ordered, adjudged, and decreed by the court that the plaintiff have a lien for the payment of this judgment upon the road-bed, station-houses, depots, bridges, rolling-stock, real-estate, and improvements pertaining to said railroad within the counties of Clark, Knox, Macon, Randolph, and Chariton, in the State of Missouri, and that plaintiff have a special execution against said property, and also a general execution against the property of the said defendants to enforce the payment of this judgment."

8th. That on the 25th day of November, 1874, execution issued out of said court on said several judgments, said executions being in the following form, to wit:

The State of Missouri to the sheriff of Chariton County, greeting:

Whereas on the 20th day of November, in the year of our Lord eighteen hundred and seventy-four, hath recovered against the Keokuk and Kansas City Railway Company and the Western Construction Company the sum of dollars, with interest thereon
26 at the rate of ten per cent. per annum from the 24th day of April, eighteen hundred and seventy-four, together with all costs by them about this suit in this behalf expended; and it was adjudged and decreed by said court that said judgment is and should be a lien and charge upon the following described property of the Keokuk and Kansas City Railway Company, to wit, the road-bed, station-houses, depots, bridges, rolling-stock, real-estate, and improvements of the Keokuk and Kansas City Railroad, lying in the counties of Clark, Knox, Macon, Randolph, and Chariton, in the State of Missouri, the property of the Keokuk and Kansas City Railroad Company, which to the said were adjudged as appears to us of record.

These are therefore to command you that of the said described real estate and personal property, and if the same be not sufficient, then of any other of the goods and chattels, lands, and tenements of the said defendants, you cause to be made the debt, interest, and costs aforesaid, and that you have the same before the judge of our said circuit court on the 17th day of May next, to satisfy the debt, interests, and costs, and have you then and there this writ, testifying how you have executed the same.

8. That said executions were by H. H. Davis, sheriff of Chariton County, Missouri, endorsed and returned as follows:

STATE OF MISSOURI,
County of Clark, ss:

I levied the within execution on the 7th day of Dec., 1874, upon the following described property as the property of the Keokuk and Kansas City Railway Company and the Western Construction
27 Company, to wit, the road-bed, iron, and cross-ties thereon of the Keokuk and Kansas City Railway Company, station-houses, depots, bridges, rolling-stock, and improvements appertaining to said road, situated in Chariton County; also a lot of cross-ties piled up along the

line of said road, supposed to be about 7,000; also locomotive engine No. 1, named James W. Lewis, and tender of the same; one passenger coach, No. 1, branded K. & K. C. R. W. Co.; and one mail & express car, branded K. & K. C. R. W. Co.; 4 box or freight cars; 2 coal cars; 1 flat car; 3 hand cars; 2 iron cars; one sett blacksmith tools; 1 lot shovels, spades, and picks, and all the tools and implements pertaining to said railroad which are in Chariton County, and all the furniture in the railroad and construction cars; office in the town of Salisbury.

(Signed) H. H. DAVIS,
Sheriff of Chariton County, Mo.

And which was returned May 3d, 1875, by Berry Owens, sheriff of Chariton County, Missouri, as follows, to wit:

STATE OF MISSOURI,
County of Chariton, ss:

I levied the within execution on May 3rd, 1875, on one box-car, three rubber-cars, and three break jacks, as the property of the Keokuk and Kansas City Railway Company and the Western Construction Company.

(Signed) BERRY OWENS,
Sheriff Chariton County, Mo.

That the defendant, Wm. Heryford, prior to the 12th day of December, 1874, caused H. H. Davis, sheriff of Chariton county, Mo., to levy
28 upon and seize, under an execution issued from the circuit court of Chariton County, Mo., in his favor and against the Keokuk and Kansas City Railway Company and the Western Construction Company, the cars in said contract described.

That on the 13th day of December, 1874, the said Jackson & Sharp Company served notice upon said sheriff claiming the said passenger car and mail, baggage, & express car under and by virtue of chapter 55, sec. 28, page 608, vol. 1, Wagner's Missouri Statutes, title executions.

That said sheriff thereupon gave said Heryford notice of the claim of said Jackson and Sharp Company, who on the 15th day of December, 1874, executed and tendered his bond to the said sheriff, with defendant, James W. Lewis, as security, which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Wm. Heryford as principal, and James W. Lewis as security, acknowledge ourselves, our heirs, &c., severally and jointly, to owe and be indebted to Henry H. Davis, as sheriff of Chariton County, in the State of Missouri, in the just & full sum of thirteen thousand dollars, for the payment of which we bind ourselves firmly by these presents. Given under our hands and seals this 15th day of December, 1874.

The above obligation is conditioned that whereas the above bounden Wm. Heryford, principal, caused H. H. Davis, sheriff of Chariton County aforesaid, to levy and seize under and by virtue of an execution issued from Chariton County circuit court on the 25th day of Nov., 1874,
29 in favor of said bounden Wm. Heryford and against the Keokuk and Kansas City Railway Co. and the Western Construction Company, upon one passenger coach, number one, and one mail, baggage & express car, number one, branded with name of the K. & K. C. R. W. Co.; as the property of the said Keokuk and Kansas City Railway Co., and whereas Jackson & Sharp Co. did, on the 12th day of Dec., 1874, serve a notice on the said Henry H. Davis, as sheriff afore-

said, claiming to be the true and lawful owner of said described property, said bond is to the effect that the said bounden Wm. Heryford and his securities will indemnify the said H. H. Davis, as sheriff aforesaid, against all damage and costs which he may sustain in consequence of the seizure and sale of the above described passenger coach No. one, and mail, baggage and express car No. one, branded with the name of the K. & K. C. R. W. Co., and to satisfy and pay to any person or persons claiming the same all damages which said person or persons may sustain in consequence of such seizure and sale, then this bond and these presents shall be null and void otherwise to remain in full force.

(Signed) WILLIAM HERYFORD. [SEAL]
JAS. W. LEWIS. [SEAL.]

That by virtue of the execution aforesaid, and in pursuance of chapter 55, sec. 58, page 608, vol. 1, Wag. Mo. Statute', title executions, Bery Owens, sheriff of Chariton County, Mo., on the 1st day of May, 1875, advertised and sold the said passenger car, and mail, baggage and express car, so levied upon, as herein before stated.

That prior to the sale and after the levy aforesaid the defend-
30 ants had knowledge of the contract above set out of Dec. 23, 1873.

That the plaintiff and the said railway co. in the negotiations of the contract aforesaid of Dec. 23, 1873, and in the subsequent correspondence and dealings after the execution of the same, treated and undertook said contract as a conditional sale.

That at the date of the execution of the contract aforesaid Job H. Jackson was the president of the Jackson and Sharp Company; S. H. Melvin was president of the Keokuk and Kansas City Railroad Company; Albert Blair was secretary of the said K. & K. C. R. W. Co.; John Foggett was the general superintendant of the said K. & K. C. R. W. Co., and that J. W. Morse was auditor of K. & K. C. R. W. Co.

That the contract herein set out has never been acknowledged or recorded.

That the passenger coach and mail, baggage and express car were marked and branded at the time they were delivered as described in the contract herein set out.

That the value of the cars, at the time of the seizure by the sheriff, was thirty-eight hundred dollars.

31 *Conclusion of law.*

As a conclusion of law upon the foregoing facts the court finds that the plaintiff is entitled to recover of the defendants the said sum of $3,800, with interest, by way of damages, in the sum of $540, together amounting to the sum of $4,340.00, for which judgment is rendered for the plaintiff; to which finding and conclusion of law the said defendants then and there excepted.

And it is hereby certified to the Supreme Court of the United States that on the foregoing facts and in the rendition of the said judgment the judges were divided in opinion upon the following points:

1. Whether on the said facts the plaintiff or the defendants were entitled to judgment.

2. Whether the instrument under which the plaintiff claims was required by the laws of Missouri to be registered in order to be valid against the creditors of the said railroad company, the property in ques-

tion having been delivered to and being in possession and use of the said company at the time of the levy.

3. Whether the said instrument is a "mortgage or deed of trust of personal property" within the meaning of the statutes of Missouri, viz., 1 Wagner's Statutes of Missouri, page 281, section 8.

The foregoing is stated under the direction of the judges and certified, and this certificate ordered to be entered of record.

JOHN F. DILLON.
A. KREKEL.

32 And afterwards, at chambers, before the honorable Arnold Krekel, one of the judges of the said circuit court, the following further proceedings were had in this cause on the 21st day of May, A. D. 1877, to wit:

Writ of error allowed, citation signed, bond for appeal filed.

HENRY H. DAVIS, ETC.,
vs.
WILLIAM HERYFORD ET AL.

This day there is presented to the honorable Arnold Krekel, judge, a writ of error to reverse the decision and judgment of this court, a citation, and a bond for appeal in the above cause; and thereupon said writ is allowed, said citation signed, and said bond approved and ordered filed, to act as a supersedeas of the judgment in the above cause.

And said bond for appeal so filed as aforesaid is in words and figures following, to wit:

Bond.

Know all men by these presents that we, James W. Lewis, as principal, and J. H. Britton and B. W. Lewis, jr., as sureties, are held and firmly bound unto Henry H. Davis, sheriff of Chariton County, Mo., suing to the use of the Jackson and Sharp Company, in the full and just sum of six thousand dollars, to be paid to the said Henry H. Davis, sheriff as aforesaid, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this day
33 of , in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at the April term, A. D. 1877, of the circuit court of the United States for the western district of Missouri, in a suit depending in said court between Henry H. Davis, sheriff of Chariton County, Missouri, suing to the use of the Jackson and Sharp Company, plaintiff, and William Heryford and James W. Lewis, defendants, judgment was rendered against the said William Heryford and James W. Lewis; and the said William Heryford and James W. Lewis having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry H. Davis, sheriff as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said William Heryford and James W. Lewis shall prosecute said writ to effect and answer all damages and costs if they fail to make good their plea

then the above obligation to be void; else to remain in full force and virtue.

JAS. W. LEWIS. [SEAL.]
J. H. BRITTON. [SEAL.]
B. W. LEWIS, JR. [SEAL.]

Approved by—

A. KREKEL, *Judge.*

STATE OF MISSOURI,
County & City of St. Louis, ss:

We, James W. Lewis, James H. Britton, and B. W. Lewis, jr.,
34 who have executed the within bond, being first duly sworn, upon our oaths state that, to the best of our knowledge and belief, we each own and are possessed of real estate and personal property in the State of Missouri subject to execution to the amount of fifteen thousand dollars, after all our debts are paid.

JAS. W. LEWIS.
J. H. BRITTON.
B. W. LEWIS, JR.

Subscribed and sworn to before me at my office, in the city of St. Louis and State of Missouri, this third day of May, A. D. one thousand eight hundred and seventy-seven.

In testimony whereof I have hereto set my hand and affixed my seal notarial this 3rd day of May, 1877.

[SEAL.]

GEO. S. GROVER,
Notary Public, St. Louis Co., Mo.

Qualified M'ch 13, 1876; term expires M'ch 9, 1882.

35 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western district of Missouri, do hereby certify that the writing hereto annexed is a true, full, and complete transcript of the record and proceedings in case No. 582, of Henry H. Davis, sheriff of Chariton County, Mo., suing to use of the Jackson and Sharp Company, against William Heryford and James W. Lewis, as fully as the same remains on file and of record in said case in this office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of Jefferson, in said district, this 7th day of August, A. D. 1877.

[SEAL.]

H. C. GEISBERG, *Clerk.*

(Indorsed:) Case No. 582. United States circuit court, western district of Missouri. H. H. Davis, to use of Jackson & Sharp Company, vs. William Heryford & Jas. W. Lewis. Duly certified copy of the record in the above entitled cause.

(Indorsement on cover:) No. 338. William Heryford and James W. Lewis, plaintiffs in error, vs. Henry H. Davis, sheriff of Chariton County, Missouri, suing to the use of the Jackson & Sharp Company. W. Missouri C. C. U. S. Filed 29th October, 1877.

REC. 338—2

OFFICE SUPREME COURT U. S.
FILED
NOV 2 1880
JAMES H. McKENNEY, Clerk.

IN SUPREME COURT OF THE UNITED STATES.

NO. 79. October Term, 1880.

WILLIAM HERRYFORD AND JAMES W. LEWIS, PLAINTIFFS IN ERROR,

AGAINST,

HENRY H. DAVIS, SHERIFF OF CHARITON COUNTY, SUING TO USE OF JACKSON & SHARP CO.

On Error to the Circuit Court of the United States, Western District of Missouri.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT OF P. E.

WILLIAM HERRYFORD, - - - - *PRO SE.*
JAMES W. LEWIS. - - - - - - *PRO SE.*

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On Error to the Circuit Court of the United States, Western District of Missouri.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT OF P. E.

STATEMENT OF THE CASE.

Prior to December 3, 1873, the Jackson and Sharp Company, a corporation located in Wilmington, Delaware, and engaged in the manufacture of railroad cars, had constructed for the Keokuk and Kansas City Railway Company, a Missouri corporation engaged in constructing and operating a railroad through Chariton and other counties of Missouri, one passenger car and one mail, baggage and express car, both numbered one, and lettered with the name of the said railway, which were delivered to said railway company January 5, 1874, at Salisbury, Chariton county, Mo., under an instrument of writing executed by both corporations, which will be found copied at large on pages 10 and 11 of the printed record.

These cars, so furnished, remained in the possession of said railway company, and in use on its road, in said Chariton county, until December 7, 1874, when they were levied upon by Henry H. Davis, then sheriff of said county, by virtue of certain executions hereinafter mentioned.

Defendants, prior to November 20, 1874, filed their several liens, for material furnished and labor performed in the construction of said railway, against said railway company and the Western Construction Company, in pursuance of an act of the General Assembly of the state of Missouri, entitled, "An act to protect contractors, subcontractors and laborers in their claims against railroad companies or corporations, contractors or subcontractors," approved March 21, 1873; and, in suits instituted upon these liens, recovered judgments against said companies, in the circuit court of said Chariton county, November 20, 1874, for the amount of their claims, and enforcing their liens, "upon the road bed, station houses, depots, bridges, rolling stock, real estate and improvements pertaining to said railroad," with orders for executions to enforce said judgments. November 25, 1874, executions were issued on said judgments, reciting the liens and describing the property as above, and commanding a levy in accordance with the judgments; which executions were placed in the hands of H. H. Davis, as sheriff of said Chariton county, who, on December 7, 1874, levied them on certain property as the property of the railway and construction companies, including the cars hereinbefore mentioned; which levy was made at the instance of defendant Herryford. These judgments, executions and levies will be found copied at length on pages 12, 13 and 14 of the printed record.

December 13, 1874, the Jackson and Sharp Company served notice in writing on said Davis, in pursuance of the execution law of Missouri, claiming said cars as their property; and said Davis thereupon notified defendant Herryford of said claim, who, on December 15, 1874, in further pursuance of said execution law, executed to said Davis the bond which is the foundation of this action, with the defendant Lewis as security. This bond, which will be found

copied at length on pages 14 and 15 of the printed record, is in practical effect a substitute for the property, and a contrivance of the statute for the trial of the rights of property taken in execution.

May 1, 1875, in pursuance of the statute, and by virtue of the executions and levies aforesaid, Berry Owens, then sheriff of said Chariton county, sold said cars. Prior to this sale, and after the levy of the executions, defendants first obtained knowledge of the instrument of writing in question.

October 25, 1875, Henry H. Davis, as sheriff of Chariton county, to the use of the Jackson and Sharp Company, commenced this action on said bond, in the circuit court of the United States for the Western District of Missouri, basing the right of recovery on the title of said Jackson and Sharp Company to said cars, and their unlawful seizure and sale as aforesaid. The answer of defendants puts in issue said title, and sets up title to said cars under the judgments and executions aforesaid, and justifies their seizure and sale thereunder as the property of the railway company. The new matter of the answer was put in issue by the reply. The issues thus joined were tried by the court April 24, 1877, and resulted in a finding and judgment for plaintiff; to reverse which defendants have brought the record to this court by writ of error. The pleadings and judgment, upon which no errors are assigned, will be found on pages 2 to 9 of the printed record.

The court made a special finding of the facts, with a conclusion of law based thereon favorable to plaintiff, (Printed record pp. 9—15,) and the judges certified a division of opinion to this court on the following questions:

1. Whether on the said facts the plaintiff or defendants were entitled to judgment.

2. Whether the instrument under which the plaintiff claims was required by the laws of Missouri to be registered in order to be valid against the creditors of the said railway company, the property in question having been delivered to and being in possession and use of said company at the time of the levy.

3. Whether the said instrument is a "mortgage or deed of trust of personal property," within the meaning of the statutes of Missouri, viz.: 1 Wagner's Statutes of Missouri, page 281, section 8. (Printed record pages 15 and 16.)

In addition to the facts above stated, the court found that the notes mentioned in said instrument had never been paid, that the bonds mentioned therein were delivered to the Jackson and Sharp Company, December 4, 1873, as collateral security for the notes, and are yet in the hands of said company, that said instrument was never acknowledged and recorded, and that the cars were marked and branded, at the time they were delivered, as described in said instrument.

The section of the statute mentioned in the certificate of division is as follows:

§ 8. No mortgage or deed of trust of personal property hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee, or cestue que trust, or unless the mortgage or deed of trust be acknowledged or proved, and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are, by law, directed to be acknowledged or proved and recorded.

The material sections of the act approved March 21, 1873, under which defendants established their liens, are as follows:

SECTION 1. All persons who shall do any work or labor in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges or culverts of any railroad company, incorporated under the laws of this state, or owning or operating a railroad within this state, and all persons who shall furnish ties, fuel, bridges or materials to such railroad company, shall have, for the work done and labor performed and for the materials furnished, a lien upon the road-bed, station-houses, depots, bridges, rolling stock, real estate and improvements of such railroad, upon complying with the provisions hereinafter mentioned: provided, such work and labor is performed, and such materials are furnished, under and in

pursuance of a contract with such railroad company, its agents, contractors, sub-contractors, lessees, trustees or construction company organized for the uses and purposes of such railroad company, or having in charge the building, construction or improvement of such railroad, or any part thereof.

SEC. 2. The lien aforesaid shall attach to the buildings, erections, improvements, road-bed and property mentioned, from the date of the commencement of such work and labor, or from the time such materials were furnished or delivered, and shall be prior to all mortgages or incumbrances placed upon the property affected by this lien, subsequent to the passage of this act. (Laws 1873, p. 58.)

The remaining sections of this act relate to the manner of establishing and enforcing the lien.

ASSIGNMENT OF ERRORS.

1. The circuit court erred in finding as a conclusion of law on the facts found that the plaintiff was entitled to recover.

2. Treating the instrument in question as a conditional sale, the plaintiff was not entitled to recover under it on the facts found; because the Jackson and Sharp company was guilty of such laches as to forfeit its rights thereunder as against defendants; and because said company had by its conduct waived its rights thereunder in favor of defendants.

3. Said instrument was intended to and did create a lien or incumbrance on the cars sold, which were a part of the rolling stock of said railroad and subject to the prior lien of defendants' claims, and the lien created by said instrument was postponed by the laws of Missouri in favor of defendants.

4. Said instrument was required by the laws of Missouri to be registered in order to be valid against the defendants under the facts found by the court.

5. Said instrument is a mortgage within the spirit and meaning of section 8 above cited, and not having been ac-

knowledged or proven and recorded as required thereby is void as against defendants.

6. The judgment rendered is against the law under the facts as found by the court.

BRIEF AND ARGUMENT.

In answering the questions certified in this case, we are necessarily forced to consider the instrument involved as though it were a conditional sale, and, at the same time, maintain that it is in reality a mortgage of personal property, or an incumbrance, within the meaning of the statutes of Missouri.

I. Treating the instrument in question as a conditional sale of the cars, and not a loan for hire, and waiving for the present the contention that it is in fact and legal effect a mortgage, we maintain that the first question certified must be answered for the defendants because:

1. The transaction was not a loan as pretended on the face of the instrument, but, to say the least, a conditional sale, and subject to the rules governing such sales.

Hervey v. Locomotive Works, 93 U. S., 664.

2. As a conditional sale, pure and simple, it was valid and binding between the parties, and, according to some cases in Missouri, even as against subsequent *bona fide* purchasers and creditors, if no laches had intervened. (*Farmlee v. Catherwood*, 36 Mo., 479; *Little v. Page*, 44 Mo., 412; *Ridgway v. Kennedy*, 52 Mo., 24; *Robbins v. Phillips*, 68 Mo., 100.)

3. But when laches intervene, or acts of waiver are shown, the rights of subsequent *bona fide* purchasers and creditors will prevail; and very short delay and slight circumstances will be held sufficient in such cases. The case cited below is decisive of the case at bar. It had not been decided when the certificate of division was granted in this case, nor when the opinion in Rogers Locomotive Works v. Lewis, 4 Dill. 129,

was written, and was not considered in these cases. It was the first express adjudication in Missouri of the questions of laches and waiver in connection with these sales, and had the effect, as was doubtless intended, to greatly limit the evil of the other cases cited above.

Robbins v. Phillips, 68 Mo., 100.

4. The acts relied on to show laches and a waiver in the case at bar are apparent on the face of the record. The cars were manufactured by the plaintiff for the railroad company, branded by it with the name of the railroad company prominently upon them, and in that condition sent to Missouri and placed upon the railroad. The indorsed notes of the railroad company for their full value had previously been taken "in payment," as expressed in the receipt on page 12 of the printed record, with bonds of the company secured by first mortgage in double their amount as collateral, which plaintiff continued to hold until after the time for complying with the terms of the sale had passed, and yet continues to hold. Under the terms of the instrument, the sale became absolute or the plaintiff entitled to a return of the cars in four months from its date, December 23, 1873, which expired April 23, 1874. Plaintiff did not then insist upon a compliance with its conditions or a return of the cars, but permitted them to remain in the possession and use of the railroad company, as apparent owner, until December 13, 1874, when it demanded them of the sheriff, being a period of nearly EIGHT MONTHS. In the meantime, defendants had expended material and labor in constructing the road, filed their liens against its property, including these cars, obtained judgments enforcing these liens, and levied their executions on the cars. It was only when inspired by these levies that plaintiff thought of asserting its rights under the instrument. The instrument was not acknowledged and placed on record, as it could have been, and thus made notice to defendants; nor was any notice otherwise given. In view of these facts, considering especially the nature of this species of property and the persons who were dealing with it, it is but right and just to hold

that plaintiff had waived the conditions of the instrument and elected to stand upon the securities in its hands, or was guilty of laches in asserting its rights thereunder, as against the defendants. The case here is even stronger than Robbins v. Phillips, *supra*, and should be ruled by it. The Supreme Court of Missouri, following the precedent just cited, would undoubtedly decide the case made on this record for the defendants.

2 Schouler's Per. Prop., pp. 301—303.
Smith v. Dennie, 6 Pick., 262.
Hutchins v. Munger, 41 N. Y., 155.
Bowen v. Burk, 13 Pa. St., 146.
Thompson v. Yeck, 21 Ill., 73.

II. The plaintiff is not entitled to recover on the facts found, because its lien under the instrument was postponed in favor of the lien of defendants by the legislative act of March 21, 1873. The facts which bring the defendants within this act appear on the face of the judgments under which they claim. For a discussion of the constitutionality and operation of the above act, see

Walker v. Railway Co., 2 Cent. Law Jnl., 481.
Brooks v. Railway Co., 101 U. S., 443.

2. That the instrument in question was designed to operate as a security cannot be questioned. As such, it was an incumbrance on the rolling stock of the railroad, and upon this rolling stock defendants secured a lien, which the statute declares, "shall be prior to all mortgages or INCUMBRANCES placed upon the property affected by this lien, subsequent to the passage of this act." Plaintiff acquired its rights subsequent to the passage of the act and subject to its provisions. The scope of this statute is greatly enlarged by the use of the word incumbrances in addition to mortgages, making it embrace *all incumbrances*. In the case cited below an instrument somewhat similar to the one under consideration, though less strongly marked, came before this court, and was held to come within a statute of Illinois requiring all conveyances of personal property "having the effect of a mortgage *or lien* upon

such property" to be recorded. The case is clearly in point here to show that the instrument in question falls within the act of the legislature creating defendants' liens.

Hervey v. Locomotive Works, 93 U. S. 664.

3. It was this case which caused Judge Dillon to doubt his judgment in Rogers Locomotive Works v. Lewis, 4 Dill., 129, as explained in the note to that case, and to agree to a certificate of division in this case.

III. The registry act of Missouri provides: "SEC. 691. Every instrument in writing that conveys any real estate, or whereby any REAL ESTATE MAY BE AFFECTED, IN LAW OR EQUITY, proved or acknowledged, and certified in the manner hereinbefore prescribed, shall be recorded," etc. Sec. 692 makes the record notice to subsequent purchasers and mortgagees. "SEC. 693. No such instrument shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record," (R. S., 1879.) Equitable liens may be acknowledged and recorded and made notice under these provisions, and the plaintiff could and should have availed itself of them.

McClurg v. Phillips, 57 Mo., 214.

2. These cars when placed upon the railroad became part of its rolling stock. The moment they were placed in position they assumed the nature of a fixture, under the operation of the lien act, which treats the rolling stock as a part of the realty for the purposes of the liens. The tendency of recent adjudications is to treat the rolling stock as a fixture, for many purposes, and it may well be so considered in this case, without disturbing any general rule to the contrary.—In this view, and as against defendants' liens, the instrument should have been acknowledged and recorded as an instrument affecting the realty; otherwise, no notice appearing, it was void as to defendants. If, however, the instrument is a mortgage at all it is thus far void under either statute.

Jones on Railroad Securities, §§ 154—163.

IV. The instrument in question, considered in its true light, is in legal contemplation a mortgage of personal property, and should have been acknowledged or proven and recorded under the statute cited. In support of this proposition we submit the following considerations:

1. The precedents in Missouri are in favor of the proposition. While conditional sales are upheld when ascertained to be strictly such, whenever the question has been made between such sales and a mortgage, the ruling has uniformly been in favor of a mortgage. In the cases cited, instruments less strongly marked than the one under consideration here were held to be mortgages.

Desloge v. Ranger, 7 Mo., 327.
Williams v. Rorer, 7 Mo., 556.
Wilson v. Drumrite, 21 Mo., 325.

2. The general rule, that when it is left in doubt whether a conditional sale or mortgage was intended the question should be resolved in favor of a mortgage, prevails to its fullest extent in Missouri, and has met with frequent recognition. Under this rule the instrument should be held a mortgage.

Desloge v. Ranger, 7 Mo., 327.
Brant v. Robertson, 16 Mo., 129.
Turner v. Kerr, 44 Mo. 429.

3. Another rule equally well sustained is, that when it appears, from the face of the instrument, or otherwise, that security for a debt was really intended, no matter what the form of the instrument, courts of equity will decree in favor of a mortgage. The true test is this: if the relation of debtor and creditor remains, and a debt subsists between the parties, it is a mortgage.

Brunt v. Robertson, 16 Mo., 129.
Wilson v. Drumrite, 21 Mo., 325.
Turner v. Kerr, 44 Mo., 429.
Worley v. Dryden, 57 Mo., 226.

4. The instrument in this case was executed to secure a pre-existing debt. It bears date December 23, 1873, and recites in the beginning, "that the parties of the first part HAVE CONSTRUCTED," the cars; hence, prior to that date,

there must have been a CONTRACT TO CONSTRUCT THEM. Further along, it recites that, "the party of the first part HAVE RECEIVED from the party of the second part three promissory notes of the party of the second part, to the order of the Western Construction Co., and indorsed by, (naming several indorsers,) together with thirteen of the first mortgage bonds of the said railway company of one thousand dollars each as collaterals for said notes; two of said notes are dated November 4, 1873, one sixty days and the other four months, each for the sum of $1,919.20, with interest at ten per cent. per annum after date; * * * the other of said notes is of date of December 15, 1873, four months, and for the sum of $2,583.00, and without interest." On page 12 of the printed record is a receipt, dated December 4, 1873, given by plaintiff for the bonds, as follows: "Received of Keokuk and Kansas City R. R. Co., thirteen one thousand dollar bonds, No. 281 to 293, both numbers inclusive, as collateral for said Co. notes GIVEN IN PAYMENT FOR ONE PASSENGER CAR, AND FOR NOTES YET TO BE GIVEN FOR ONE MAIL, BAGG. AND EX. CAR." The instrument provides, printed record page 11, that the railway company may purchase the cars at $6,383.40, within a few dollars of the aggregate amount of the notes. Here we have, in full view, a contract to construct the cars existing as early as November 14, 1873, the date of the first notes, and the indorsed notes of the railway company for the contract price, secured by collaterals in double the amount, "GIVEN IN PAYMENT" for the cars, all in existence prior to December 15, 1873, the date of the last note, and all prior to the date of the instrument in question. These notes created, and were intended to create, an indebtedness between the plaintiff and the railway company, which existed at the date of the instrument and was not extinguished by it, and still exists, for that matter. There is a provision in the instrument, printed record page 10, that plaintiff should collect these notes AT MATURITY and hold the proceeds, and still others, on page 11, to the effect that when the notes were paid the railway company should own the cars.

5. The instrument contains a provision, printed record page 11, that, upon default in the payment of either note at maturity, plaintiff MIGHT take possession of the cars, and if it did so it MUST SELL THEM, and out of the net proceeds pay the notes and interest, paying the surplus to the railway company. This provision is inconsistent with a conditional sale, and shows that the instrument is a mortgage.

1 Jones on Mortgages, §271 and notes.

6. The instrument also contains, in the last two paragraphs, provisions in the nature of a defeasance, which is one of the usual features of a mortgage. Stripped of their verbiage, and considered apart from the absurd idea of a loan for hire and a right to purchase at some future day, these provisions simply mean that, upon the payment of the notes, the mortgage shall become void and the property be reconveyed.

1 Jones on Mortgages, §§ 241, 242.

7. In considering this question we have mainly relied on Missouri decisions, because they are supposed to be controlling; but those elsewhere establish the same general doctrines; and adjudged cases show that the instrument is a mortgage.

Hervey v. Locomotive Works, 93 U. S., 664.
Thompson v. Yeck, 21 Ill., 73.
Murch v. Wright, 46 Ill., 487.
Lucas v. Campbell, 88 Ill. 447.
Greer v. Church, 13 Bush (Ky) 430.
Sewing Machine Co. v. Anderson, 23 Minn. 57
Musgat v. Pumpelly, 46 Wisc. 660.
Stokes v. Hollis. 43 Ga., 262.

8. The instrument being a mortgage, and not having been acknowledged and recorded as required by statute, the possession having remained with the mortgagor, is void as to the defendants, even with actual notice.

Bevans v. Bolton, 31 Mo., 437.

JAMES W. LEWIS. PRO SE.
WILLIAM HERRYFORD, PRO SE.

IN THE

Supreme Court of the United States.

No. 79.

WILLIAM HERYFORD ET AL.

vs.

H. H. DAVIS, *for use of Jackson and Sharp Company.*

In Error to the Circuit Court of the United States for the Western District of Missouri.

T. T. CRITTENDEN,
WASHINGTON, D. C.,
Of Counsel for Defendant in Error.

R. O. Polkinhorn, Printer, D street, Northwest.

In Supreme Court of the United States.

No. 79.

WILLIAM HERYFORD ET AL.

vs.

HENRY H. DAVIS, *Sheriff for use, &c.*

This is an action under the statutes of Missouri by Henry H. Davis, Sheriff, &c., for the use of the Jackson and Sharp Company, upon a bond of indemnity given by the defendants to said Davis as Sheriff, &c.

The cause was submitted to the court and a special finding of facts, with conclusion of law and certificate of division of opinion therein, was filed by the court and ordered to be made part of the record, as follows:

Special Finding.

IN THE CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT OF MISSOURI.

HENRY H. DAVIS, TO THE USE OF THE JACKSON & SHARP COMPANY, plaintiff,
vs.
WILLIAM HERYFORD AND JAMES W. LEWIS, defendants.

1st. That on and prior to the 23d day of December, 1873, the date of the contract hereinafter mentioned and set out, the plaintiff, The Jackson and Sharp Company, was a cor-

poration incorporated under and by the laws of the State of Delaware, having its office and doing business at the city of Wilmington, in the State of Delaware, and engaged in manufacturing railroad cars; that the Keokuk and Kansas City Railroad Company, a corporation incorporated under and by the laws of the State of Missouri, and engaged in the construction of a railroad through the county of Chariton and other counties in the State of Missouri.

2d. That on the 5th day of January, 1874, the plaintiff delivered to said railroad company at Salisbury, Missouri, to be used on its railroad in the State of Missouri, one passenger car No. 1, and one mail, baggage, and express car, also No. 1, lettered with the name of the aforesaid railroad company, under and pursuant to the terms and conditions of a written contract dated the twenty-third day of December, 1873, as follows, to wit:

3d. Articles of agreement, made and entered into this twenty-third day of December, A. D. 1873, by and between the Jackson and Sharp Company, a corporation of the State of Delaware, located in the city of Wilmington, State aforesaid, of the first part, and the Keokuk and Kansas City Railway Company of Missouri, with office at Salisbury, State aforesaid, of the second part, witnesseth:

That the parties of the first part have constructed one passenger car No. 1, and one mail, baggage, and express car, also No. 1, and lettered with the name of the aforesaid railway Co., to be used on the railroad of the party of the second part for hire. It is therefore agreed as follows: The said party of the *first hereby agree to loan* to the said party of the second part, for hire, the said passenger and mail, baggage, and express cars for the space of four months from the date of this agreement, to be used on the said Keokuk and Kansas City Railway Co., and to deliver the same to the party of the second part at Wilmington, Dela-

ware, to be transported to the said railway company at Salisbury, Missouri, at the expense and risk of the party of the second part, *to be used on the said road for hire as aforesaid*, and not elsewhere without the written consent of the party of the first part.

The party of the first part have received from the party of the second part three promissory notes of the party of the second part, to the order of Western Construction Co., and endorsed by A. C. Vandewater, president, F. A. Jones, John Foggett, A. C. Vandewater, G. P. Lawrence, Jno. C. Noyes, and J. W. Morse, together with thirteen of the first mortgage bonds of said railway co. of one thousand dollars each, as collaterals for said notes; two of said notes are dated November 14, 1873, one sixty days and the other four months each, for the sum of nineteen hundred and nineteen $\frac{20}{100}$ each, with interest at the rate of ten per cent. per annum, after date, and payable at the Mercantile Bank of St. Louis, Missouri; the other of said notes is of date of December 15, 1873, four months, and for the sum of twenty-five hundred and eighty-three dollars, and without interest, and is made payable at the National Bank of Commerce N. Y.; which said three notes the said party of the first part are *to hold as collateral security*, and to collect the same at maturity, and to hold the proceeds when collected for the safe custody and return to the party of the first part, when demanded, of the said passenger and mail, baggage, and express cars delivered to the party of the second part for the term of four months, *for hire* as aforesaid, the said party of the second part to have the right and privilege *to purchase at any time, the said passenger and mail, baggage*, and express cars, within the period of four months from aforesaid date, upon the payment to the party of the first part in cash the sum of six thousand three hundred and thirty-eight $\frac{40}{100}$ dollars, with interest at the rate of ten per cent. per annum from the date of the agreement

until day of payment, but until such payment is made in full, the said party of the second part shall have no right, title, claim, or interest in and to the said passenger, and mail, baggage, and express cars, except as to their use or hire, nor any right or authority in any way to dispose of, hire sell, mortgage, or pledge the same, but that the said cars are, and shall remain the property of the party of the first part, to be accounted for by the party of the second part to the party of the first part, and to be redelivered to the party of the first part, when demanded in default of the payment of the aforesaid sum of six thousand three hundred and thirty-eight $\frac{40}{100}$ dollars, with interest as aforesaid, hereinbefore described, anything to the contrary herein contained notwithstanding.

It also agreed that should there be any default in the payment of any one of the above described three promissory notes at the time and on the day that they or either of them respectively become due and payable, and the party of the first part shall elect to take into their own possession the above described passenger and mail, baggage and express cars delivered as aforesaid, the several sums which may have been collected on account of the above described promissory notes are to be retained by the party of the first part for their own use, and the passenger and the mail, baggage and express cars are to be sold by the party of the first part at public or private sale, and of the net amount realized from said sale so much as should be needed to make the amount remaining due and unpaid on the above described promissory notes, with the interest that may have accrued on the same, shall be retained by the said party of the first part, and the surplus, if any, shall be paid over to the said party of the second part.

And the said party of the first part thereby agree with the said party of the second part that if all the said three promissory notes are paid on the day and at the time that

they the said three promissory notes severally became due and payable according to their terms, tenor, and effect, that upon payment of all the said notes having been made without any hinderance or delay whatever, the party of the first part will then *relinquish their ownership* to the said passenger car and the mail, baggage, and express car and will give to the party of the second part a good and sufficient bill of sale or conveyance for the said cars, and will apply to the payment of the same the proceeds of the above described promissory notes, interest on notes overdue in any event to belong to the party of the first part.

And it is also agreed and understood that if the said notes are paid according to their tenor and effect that the said party of the first part may retain the money paid up on said notes, and then the said cars shall belong to and be the property of the said party of the second part, and the said party of the first part shall on request relinquish their ownership thereof, and make a bill of sale or conveyance of all their right, title, and interest therein to the said party of the second part.

In witness whereof the parties have hereto set their name and caused the seal of their respective corporations to be affixed.

[SEAL.] JACKSON AND SHARP COMPANY,
JOB H. JACKSON,
THE KEOKUK & KANSAS CITY RAILWAY CO.,
By S. H. MELVIN,
President.
[SEAL.] ALBERT BLAIR,
Secretary.

4th. That said cars were brought to Missouri and were placed upon and used by said railroad company on its railroad in Chariton County, Missouri.

5th. That the notes mentioned in said contract were not

paid at maturity, and still remain unpaid; that on the 4th day of December, 1873, the said plaintiff received thirteen thousand dollars in the first mortgage bonds of said railroad company as collateral security for the notes mentioned in said contract, for which the said plaintiff executed and delivered its receipt, which is in the following words and figures, to wit:

WILMINGTON, DEL., *December 4, 1873.*

Received of Keokuk and Kansas City R. R. Co. thirteen one thousand dollar bonds, No. 281 to 293, both numbers inclusive, as collateral for said Co. notes given in payment for one passenger car, and for notes yet to be given for one mail, bagg., and ex. car.

JOB H. JACKSON, *Pres't.*

6th. That said bonds are yet in the hands of said plaintiff.

7th. That the defendant in this cause filed their several liens for materials furnished and labor performed in the construction of said railroad against said railroad Co. and the Western Construction Co., and recovered judgments in the Circuit Court of Chariton County, Missouri, against said companies on the 20th day of November, 1874, under and by virtue of the provisions of an act of the general assembly of the State of Missouri, entitled "An act to protect contractors, sub-contractors, and laborers in their claims against railroad companies or corporations, contractors or sub-contractors," approved March 21st, 1873, said judgments being in the following forms, to wit:

"Now, at this day, this cause coming on to be heard, and an interlocutory judgment having been rendered at the last term of this court in default of said defendants, both having been duly served with process, and no jury being demanded, the court proceeds to try the cause and to assess the damage sustained by the plaintiffs in this cause;

whereupon the court finds from the evidence and admissions in the pleadings that the plaintiff hath sustained damages in the sum of dollars, being the amount claimed in plaintiff's petition, with interest at the rate of six per cent. per annum, from the 24th day of April, 1874 (the date of the service of the summons in this cause).

"It is therefore considered and adjudged by the court that the plaintiff recover of the said defendants the sum of four thousand eight hundred and twenty-nine and $\frac{78}{100}$ dollars, for his debt and damages, together with his costs by him about his suit in this behalf laid out and expended; and it appearing to the satisfaction of the court that the damages sustained by the plaintiff in this cause is for materials and cross-ties furnished defendants on the Keokuk and Kansas City Railroad in constructing and improving the road-bed of said railroad, and the said plaintiff having fully and in all things complied with the requisition of an act of the general assembly of the State of Missouri, entitled 'An act to protect contractors, sub-contractors, and laborers in their claims against railroad companies or corporations, contractors or sub-contractors,' approved March 7th, 1873, it is ordered, adjudged, and decreed by the court, that the plaintiff have a lien for the payment of this judgment upon the road bed, station houses, depots, bridges, rolling-stock, real estate, and improvements pertaining to said railroad within the counties of Clark, Knox, Macon, Randolph, and Chariton, in the State of Missouri, and that plaintiff have a special execution against said property, and also a general execution against the property of the said defendants to enforce the payment of this judgment."

8th. That on the 25th day of November, 1874, execution issued out of said court on said several judgments, said executions being in the following form, to wit:

The State of Missouri to the sheriff of Chariton County, greeting:

Whereas on the 20th day of November, in the year of our Lord eighteen hundred and seventy-four, hath recovered against the Keokuk and Kansas City Railway Company the sum of dollars, with interest thereon at the rate of ten per cent. per annum from the 24th day of April, eighteen hundred and seventy-four, together with all costs by them about this suit in this behalf expended; and it was adjudged and decreed by said court that said judgment is and should be a lien and charge upon the following described property of the Keokuk and Kansas City Railway Company, to wit: the road-bed, station-houses depots, bridges, rolling-stock, real estate, and improvements of the Keokuk and Kansas City Railroad, lying in the counties of Clark, Knox, Macon, Randolph, and Chariton, in the State of Missouri, the property of the Keokuk and Kansas City Railroad Company, which to the said were adjudged as appears to us of record.

These are therefore to command you that of the said described real estate and personal property, and if the same be not sufficient, then of any other of the goods and chattels, lands, and tenements of the said defendants, you cause to be made the debt, interest, and costs aforesaid, and that you have the same before the Judge of our said Circuit Court on the 17th day of May, next, to satisfy the debt, interests, and costs, and have you then and there this writ, testifying how you have executed the same.

8. That said executions were by H. H. Davis, Sheriff of Chariton County, Missouri, endorsed and returned as follows:

STATE OF MISSOURI, }
County of Clark, ss. }

I levied the within execution on the *7th day of Dec., 1874*, upon the following described property as the property of the Keokuk and Kansas City Railway Company and the Western Construction Company, to wit, the road-

bed, iron, and cross-ties thereon of the Keokuk and Kansas City Railway Company, station-houses, depots, bridges, rolling-stock, and improvements appertaining to said road, situated in Chariton County; also a lot of cross-ties piled up along the line of said road, supposed to be about 7,000; also locomotive engine No. 1, named James W. Lewis, and tender of the same; one passenger coach, No. 1, branded K. & K. C. R. W. Co.; and one mail and express car, branded K. & K. C. R. W. Co.; 4 box or freight cars; 2 coal cars; 1 flat car; 3 hand cars; 2 iron cars; one set blacksmith tools; 1 lot shovels, spades, and picks, and all the tools and implements pertaining to said railroad which are in Chariton County, and all the furniture in the railroad and construction cars; office in the town of Salisbury.

(Signed) H. H. DAVIS,
Sheriff of Chariton County, Mo.

And which was returned May 3d, 1875, by Berry Owens, sheriff of Chariton County, Missouri, as follows, to wit:

STATE OF MISSOURI,
County of Chariton, ss:

I levied the within execution on May 3d, 1875, on one box-car, three rubber-cars, and three break jacks, as the property of the Keokuk and Kansas City Railway Company and the Western Construction Company.

(Signed) BERRY OWENS.
Sheriff Chariton County, Mo.

That the defendant, Wm. Heryford, prior to the 12th day of December, 1874, caused H. H. Davis, sheriff of Chariton County, Mo., to levy upon and seize, under an execution issued from the Circuit Court of Chariton County, Mo., in his favor and against the Keokuk and Kansas City Railway Company and the Western Construction Company, he cars in said contract described.

That on the 13th day of December, 1874, the said Jackson and Sharp Company served notice upon said sheriff claiming the said passenger car and mail, baggage, and express car under and by virtue of chapter 55, sec. 28, page 608, vol. 1, Wagner's Missouri Statutes, title executions.

That said sheriff thereupon gave said Heryford notice of the claim of said Jackson and Sharp Company, who on the 15th day of December, 1874, executed and tendered his bond to the said sheriff, with defendant, James W. Lewis, as security, which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Wm. Heryford as principal, and James W. Lewis as security, acknowledge ourselves, our heirs, &c., severally and jointly, to owe and be indebted to Henry H. Davis, as sheriff of Chariton County, in the State of Missouri, in the just and full sum of thirteen thousand dollars, for the payment of which we bind ourselves firmly by these presents. Given under our hands and seals this 15th day of December, 1874.

The above obligation is conditioned that whereas the above bounden Wm. Heryford, principal, caused H. H. Davis, sheriff of Chariton County aforesaid, to levy and seize under and by virtue of an execution issued from Chariton County Circuit Court on the 25th day of Nov., 1874, in favor of said bounden Wm. Heryford and against the Keokuk and Kansas City Railway Co. and the Western Construction Company, upon one passenger coach, number one, and one mail, baggage and express car, number one, branded with name of the K. & K. C. R. W. C.; as the property of the said Keokuk and Kansas City Railway Co., and whereas Jackson and Sharp Co. did, on the 12th day of Dec., 1874, serve a notice on the said Henry H. Davis, as sheriff aforesaid, claiming to be the true and lawful owner of said described property, said bond is to the effect that the said bounden Wm. Heryford and his securities

will indemnify the said H. H. Davis, as sheriff aforesaid, against all damages and costs which he may sustain in consequence of the seizure and sale of the above described passenger coach No. one, and mail, baggage and express car No. one, branded with the name of the K. & K. C. R. W. Co., and to satisfy and pay to any person or persons claiming the same, all damages which said person or persons may sustain in consequence of such seizure and sale, then this bond and these presents shall be null and void, otherwise to remain in full force.

(Signed.) WILLIAM HERYFORD. [SEAL.]
JAS. W. LEWIS. [SEAL.]

That by virtue of the execution aforesaid, and in pursuance of chapter 55, sec. 58, page 608, vol. 1, Wag. Mo. Statute', title executions, Berry Owens, sheriff of Chariton County, Mo., on the 1st day of May, 1875, advertised and sold said passenger car, and mail, baggage and express car, so levied upon, as herein before stated.

That prior to the sale and after the levy aforesaid, the defendants had knowledge of the contract above set out of Dec. 23, 1873,

That the plaintiff and the said railway co. in the negotiations of the contract aforesaid of Dec. 23, 1873, and in the subsequent correspondence and dealings after the execution of the same, treated and undertook said contract as a conditional sale.

That at the date of the execution of the contract aforesaid Job H. Jackson was the president of the Jackson and Sharp Company; S. H. Melvin was president of the Keokuk and Kansas City Railroad Company; Albert Blair was secretary of the said K. & K. C. R. W. Co.; John Foggett was the general superintendent of the said K. & K. C. R. W. Co., and that J. W. Morse was auditor of K. & K. C. R. W. Co.

That the contract herein set out has never been acknowledged or recorded.

That the passenger coach and mail, baggage and express car were marked and branded at the time they were delivered as described in the contract herein set out.

That the value of the cars, at the time of the seizure by the sheriff, was thirty-eight hundred dollars.

Conclusion of Law.

As a conclusion of law upon the foregoing facts, the court finds that the plaintiff is entitled to recover of the defendants, the said sum of $3,800, with interest, by way of damages, in the sum of $540, together amounting to the sum of $4,340.00, for which judgment is rendered for the plaintiff; to which finding and conclusion of law the said defendants then and there excepted.

And it is hereby certified to the Supreme Court of the United States, that on the foregoing facts and in the rendition of the said judgment the Judges were divided in opinion upon the following points:

1. Whether on the said facts the plaintiff or defendants were entitled to judgment.

2. Whether the instrument under which the plaintiff claims was required by the laws of Missouri to be registered in order to be valid against the creditors of the said railroad company, the property in question having been delivered to, and being in possession and use of the said company, at the time of the levy.

3. Whether the said instrument is a "mortgage or deed of trust of personal property" within the meaning of the Statutes of Missouri, viz.: 1 Wagner's Statutes of Missouri, Page 281, Section 8.

The foregoing is stated under the direction of the judges and certified, and this certificate ordered to be entered of record.

JOHN F. DILLON.
A. KREKEL.

Argument.

1. Whether, on the said facts, the plaintiffs or the defendants were entitled to judgment.

This question is to be settled by determining the ownership of the property at the date of said bond of indemnity, Dec. 15, 1874, (Rec., p. 3.) In the contract between the Jackson & Sharp Company and the Keokuk and Kansas City Railroad, Rec., p. 10, it appears that on the 23d of December, 1873, said Jackson and Sharp Company had constructed and were the owners of "one passenger car, No. 1, and one mail, baggage and express car, No. 1," and being such owner, said Jackson & Sharp Company agreed to loan the same for hire to said Keokuk and Kansas City Railroad Company, to be used on the said road for hire as aforesaid; that said Jackson and Sharp Company received from said Railroad Company certain bonds and notes of said railroad company, (Rec., p. 10), to hold as collateral security, and to collect the said notes at maturity, and to hold the proceeds when collected for the safe custody and return to the said Jackson and Sharp Company, when demanded of the said passenger and mail, baggage and express cars, delivered to said railroad company for the term of four months, for hire, as aforesaid, the said railroad company to have the right and privilege to purchase at any time, &c., said passenger, mail, baggage and express cars. It further appears from said contract (Rec.. p. 11) that upon default in payment of any of said notes so held as collateral the said Jackson and Sharp Company could take possession of said cars, and sell the same at private or public sale; but if said notes were duly paid the said Jackson and Sharp Company would then relinquish their title to said cars and give a sufficient bill of sale to the said Keokuk and Kansas City Railroad Company.

The receipt (Rec., p. 12) was merely formal, is subject to explanation, and is fully explained away by the formal con-

tract, (Rec., p. 10), which was made nineteen days after the date of said receipt.

By this contract it is clear that the intention of the parties to it was that the title to and ownership of said cars remained unchanged in the Jackson and Sharp Company, and was to remain unaltered until two things were done: first, the payment of the said notes held as collateral, as aforesaid, and, second, the making of a bill of sale or conveyance of their title to the said railroad company. The frequent repetition in said contract of the fact of ownership shows how carefully both parties to it guarded the title of the Jackson and Sharp Company in and to said cars. As a matter of fact, said railroad company acquired no title to said cars, no consideration was paid for them by the railroad company, and none was received by the Jackson and Sharp Company.

It is therefore inequitable to apply the property of the latter company, to the payment of the debts of the former company, and even the technical rules of law do not require it.

In these cases the intent of the parties as gathered from the contract, &c., will govern.

1 Parsons on Contracts, 553 and note *n*;
2 Parsons on Contracts, 527 and notes *k*. and *l*;
2 Parsons on Contracts, 494, 495, 504, 506.

If the court should construe the contract to be a conditional sale, then, on a sale with delivery of a chattel at a fixed price, to be paid on a certain day, but until paid, the title to remain in the seller, payment is a condition precedent and until performance, the property is not vested in the buyer.

Porter vs. *Pettngill*, 12 New Hampshire, Rep. 298;
Bigelow vs. *Huntley*, 8 Vermont, Rep. 151;
Ayre vs. *Bartlett*, 9 Pick. 156;

Reed vs. *Upton*, 10 Pick. 522;
Fairbanks vs. *Phelps*, 22 Pick. 535;
Copeland vs. *Bosquet*, 4 Wash. 588;
Strong vs. *Taylor*, 2 Hill. 326;
Hunt vs. *Bay State Iron Co.*, 97 Mass. Rep. 279;
Fenwick vs. *Smith*, 63 Penn. State Rep. 18;
Clarke vs. *Farnum*, 7 Rhode Island Rep. 174;
Coggill vs. *Hartford & New Haven Railroad Co.*, 3 Gray (Mass.) 545.

The conditions were not complied with. (Rec., p. 12.)

The plaintiff in error had notice of the title of the Jackson and Sharp Company, before the execution of the bond herein sued on Rec., p. 14.

This case is clearly distinguished from the case of *Hervey* vs. *Locomotive Works*, 93 U. S., 664, by the variance between the terms of the contracts in that and the present case, and by the difference of the laws in regard to such contracts in the States of Illinois and Missouri.

In the Hervey case the contract recites that, "The party of the first part is the owner of the engine, that the party of the second part is desirous to use it, and eventually of purchasing it; and that therefore, in consideration of one dollar paid to the party of the first part, by the party of the second part, and in consideration of the covenants and agreements thereinafter contained, the party of the first part agrees to let and lease, and does let and lease to the party of the second part, the said locomotive engine and tender, with the right to place the same upon its railroad, and to use the same in the usual manner; and in consideration thereof the party of the second part covenants and agrees to pay to the party of the first part, for use and rent, the sum of $12,093,96, as follows:

1st. Ten per cent. in cash, amounting to $1,150, one note due February 24th, 1872, for $3,580,16; one note due May

24th, 1872, for $3,647,90, and one note due August 24th, 1872, for $3,715,90. In other words, according to this agreement, the party of the second part agrees to pay $12,093,96 rent, for the use of an engine one year. Evidently this was not the intention of the parties. In addition to this, the party of the second part was to keep the engine in good order; and the party of the first part further agreed that if the party of the second part paid all the notes promptly and all renewals of the same, then it would sell, and transfer and convey to the party of the second part, the locomotive engine and tender in the condition it then might be. And it was further agreed that if the party of the second part failed to make the payments then the party of the first part should be at liberty to enter upon and take possession of the locomotive; and the party of the second part further agreed, if any default was made, that they would within thirty days thereafter, deliver the locomotive engine to the party of the first part; and then it was the duty of the party of the first part to sell it, and have the proceeds of the sale pay what might be due upon the notes, and the expenses of the sale; and if any balance was left, deliver the same to the party of the second part.

As to the law of Illinois:

In the case of *Cyrus H. McCormick et al.* vs. *George M. Hadden*, 30 Illinois, 370, it was held that where the vendor of personal property delivers possession to the purchaser under an agreement, that the property is to be considered as belonging to the vendor until the payment of the purchase money, notwithstanding such delivery of possession; such agreement as to the creditors of the purchaser is fraudulent and void. Also, to the same effect:

Ketcham vs. *Watson*, 24 Illinois, 591;
Thompson vs. *Yeck*, 21 Ill., 73;
Murch vs. *Wright*, 46 Ill., 487.

As to the law of Missouri:

As a conditional sale, pure and simple, it was valid and binding between the parties, and against subsequent *bona fide* purchaser or creditors.

Parmlee vs. *Catherwood*, 36 Mo. Rep., 480;
Little vs. *Page*, 44 Mo. Rep., 412;
Ridgway vs. *Kennedy*, 52 Mo., 24;
Robbins vs. *Phillips*, 68 Mo., 100.

Also, to the same effect:

Rogers Locomotive Works vs. *Lewis*, 4 Dillon's Rep., 158.

These cases decide what the law has been and is now upon the subject of conditional sales in the State of Missouri.

Therefore, under the decision of this court in said case of *Hervey* vs. *Locomotive Works*, 93 U. S. Rep., 664, the law of Missouri must govern in this cause.

There was no evidence tending to show any waiver of the rights of the vendors, and, certainly, the lapse of a few months in a matter of this kind is not such laches as will forfeit their title, neither do the decisions of the Supreme Court of Missouri sustain such a doctrine.

In the case of *Rogers Locomotive Works* vs. *Lewis*, 4 Dillon, 158, the notes were all overdue eighteen months, and this was not laches; in this case the notes were overdue only eight months.

There is a peculiar statute of Missouri on the subject of bailment by way of loan, as appears in 1 Wagner's Statutes of Missouri, p. 280, section 5, and this has been construed in the cases of *McDermott* vs. *Barnum et al.*, 16 Mo. Rep., 114, and *Criddles Adm'r* vs. *Criddles*, 21 Mo. Rep., 522. It may be that this section had some effect upon the mind of the person who drafted the contract of loan from said Jackson and Sharp Company to said railroad company.

This contract was not acknowledged before a notary, was evidently never intended for record, and cannot be metamorphosed into a chattel mortgage. It was clearly a conditional sale, but the conditions were never complied with, and the title remained in the vendors.

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